RESPONSE TO PUBLIC COMMENTS

Arizona Department of Transportation Statewide Permit for Discharge to Waters of the United States under the Arizona Pollutant Discharge Elimination System Program

Permit No: AZS000018-2008

Applicant: Arizona Department of Transportation (ADOT)
206 S. 17th Avenue, Mail Drop 102A
Phoenix, AZ 85007

Permit Action: Final permit decision and response to comments received on the draft Statewide Permit for Discharge to Waters of the US public noticed on June 26, 2008. Following is ADEQ's response to comments received on the subject draft permit.

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Comments were received on the public noticed draft permit from the permittee (ADOT), the City of Flagstaff, and a combined letter was received from the Arizona Chamber of Commerce and the Phoenix Chamber of Commerce.

In addition to changes made by in response to the comments, the Arizona Department of Environmental Quality (ADEQ) made several minor corrections to the permit, fact sheet and appendices pertaining to formatting, punctuation, spelling and cross-references.

The following comments were received on July 28, 2008 from ADOT.
The comments are grouped under several subject headings. ADEQ responses follow this organization.

Flexible Nature of the Stormwater Program

COMMENT NO. 1: . . . As a non-traditional MS4 and one that does not have the land use and ordinance promulgation authority typically associated with traditional MS4s, ADOT's MS4 Statewide Individual Permit should be tailored to those activities that ADOT can carry out. . . . the municipal aspects of the permit (e.g. erosion control, illicit discharge detection, outfall mapping etc.) should focus on the regulated MS4 urbanized areas of the state. Other DOTs are limited to those urbanized areas (OH, CO [Phase I areas only], VT) and ADOT would prefer to focus on areas where we know we can have a beneficial impact to water quality. ADOT would like to see an amended permit that limits its geographic coverage to coincide with only the Phase I and II areas. ADOT requests that they continue to monitor those outfalls within the MS4 urbanized areas that discharge to a water of the U.S. as required of other municipalities.

RESPONSE NO. 1: ADEQ recognized ADOT's unique status as a non-traditional MS4 early in the course of permit application discussions with ADOT. The public noticed version reflects tailored legal authorities and other areas specifically changed in response to these discussions. ADEQ considers the conditions of the draft permit are those that ADOT can implement. ADEQ considers the scope of the permit is appropriate and that ADOT can have a beneficial impact to water quality in many activities statewide. Therefore, ADEQ has asked ADOT to take responsibility for its system statewide. 40 CFR 122.26(a) (1) (v) specifies "the Director may designate discharges from MS4s on a system-wide or jurisdiction-wide determination." See also 40 CFR 122.26(b)(4)(iii) and (iv) that outlines the Director's discretion to designate other areas as part of a large or medium separate storm sewer system. & 122.26(a)(5).

Regarding the monitoring comment, ADOT is to monitor at locations within Tucson and Phoenix, clearly within Phase I areas. Per Section 8.7.2.1(a), ADOT is also directed to choose 3 other monitoring locations. ADOT may choose any location within or outside a Phase I or II area provided that at least one impaired water and one unique water to which ADOT discharges is included.

No change was made to the permit as a direct result of these comments. However, in review of this issue, ADEQ modified language in Section 8.6.4 to include any ADOT facility that may be placed within 1/4 mile of an impaired or unique water.

Monitoring

COMMENT NO 2: ADOT currently uses passive stormwater samplers at our existing Phoenix and Tucson monitoring locations. The additional permit requirement for flow weighted samples at all monitoring locations (two existing plus three new to be identified and installed during the first 12 months of the permit) will more than likely be accomplished by the installation of auto samplers. However since ADOT is a state agency, the purchase and installation of the new equipment will need to go through the procurement process which can be lengthy. ADOT requests that for the first permit year the current set-up of passive sampling of the conventional parameters is allowed to continue and the requirement of time weighted samples begin with the second year of the permit after which the Phoenix monitoring location has been relocated and the three new monitoring locations have been established as laid out in Section 8.7.2.l(a) of the permit. By starting the flow weighted samples the second year, the entire monitoring frequency should be shifted to enable ADOT to collect all of the required samples (i.e., sampling scheduled to occur in years 1 and 3 will now occur in years 2 and 4).

RESPONSE NO. 2: ADEQ agrees to a continuation of ADOT's current monitoring program for the first year of the program. The permit language in Section 8.7.2.1(a) was changed to reflect this and the sampling schedule in Table 8.7.2 has been shifted to reflect monitoring in years 2 and 4, as requested.

COMMENT NO 3: Monitoring Above and Beyond Established Requirements. Requiring ADOT to conduct monitoring that is not required or enforced upon other entities, regulated groups, and activities does not seem appropriate. The Grand Canyon National Park Airport which falls under industrial Sector S of the Multi- Sector General Permit (MSGP) would not ordinarily conduct benchmark monitoring due to the small quantity of de-icing chemicals used at the facility. However,

in the draft permit monitoring is required regardless of the amount of de-icing chemicals used and at a much higher frequency than would normally be required (under the MSGP).

RESPONSE NO. 3: ADEQ is issuing ADOT an individual permit, not a general stormwater permit that would apply to numerous facilities statewide. Whether a provision is in the MSGP, or not, is not necessarily relevant to this permitting decision. ADEQ develops monitoring for an individual permit on an individual basis and has discretion to require monitoring for pollutants that might be discharged. ADEQ has authorities related to monitoring requirements under 40 CFR 122.48, 122.41, and A.R.S. 49-203(A)(7)and (B)(2). See also 33 USC 1342(a)(1) and (a)(2). A.R.S. 49-203(A)(7).

In response to this comment, ADEQ has further reviewed the provisions relating to airport monitoring. We note there are very specific requirements within the permit relating to the airport in the staff training provisions in Section 3.3.3.1.a.ii.6; requirements to update and implement a SWPPP in Section 6.2.7; and Discharge restrictions in Section 6.6. Therefore, for this permit term, ADEQ has removed the minimal monitoring provisions previously in Section 8.6.1. (ADEQ has marked this Section as 'reserved' to avoid renumbering and the potential effects on cross references throughout the permit.) Airport activities and stormwater protections in place may be reviewed in the future to determine if outfall monitoring is appropriate.

COMMENT NO. 4: ADOT believes that there is little value in monitoring our maintenance yards due just to their proximity to unique and impaired waters. Consideration should be given as to what if anything they may be discharging or whether or not those stormwater discharges will make it to the listed water. ADOT requests the removal of the monitoring requirements for the four listed maintenance yards in Section 8.6.4 of the permit unless they are shown to directly discharge to the unique or impaired water that is within ¼ mile of the yard.

RESPONSE NO. 4: ADEQ considers that discharges in proximity to unique or impaired waters generally require additional considerations for protection of these special waters. Unique waters cannot be degraded at all, and impaired waters already have issues with non-attainment of standards. A ¼ mile setback may not in all cases be significantly protective (based on issues of flow, substrate, saturation, vegetation, etc.), and in some cases, it may be overprotective. However, ADEQ considers this to be a distance that will be protective in the majority of cases. Rather than requiring detailed site-specific studies of all facilities which may be of concern, we are consistently applying the ¼ mile default.

Based on ADEQ's knowledge of ADOT's maintenance yards, a potential exists for discharge of pollutants of concern identified in Section 8.6.4(b) that could impact water quality. Please also note that the sampling requirement in the permit is a minimal two samples per year per outfall for TDS, TSS, TPH and pollutants that may contribute to impairment.

No change was made to the permit as a result of this comment.

Other Major Concerns

COMMENT NO. 5: Third party liability. The permit . . . does not protect ADOT from w [sic] third party liability; from inactions or actions of others beyond the control of ADOT. . . . ADOT

[proposes] . . . the following language . . . : ADOT shall only be liable for those discharges that are a result of their operational control and direction.

RESPONSE NO. 5: This liability is unchanged from the Phase I permit that previously covered ADOT. The Clean Water Act (CWA) requires permittees to be one of the responsible parties (there may be others) for unpermitted discharges. In practice, ADEQ would consider all the specifics of a violation before determining which party or partie(s) to involve in an enforcement action if necessary. As the CWA is a strict liability program, the language that ADOT has proposed would not be appropriate.

No change was made to the permit as a result of this comment.

COMMENT NO. 6: Mapping and Inspections. During ongoing negotiations ADOT requested that ADEQ include a definition of pass through drainage or cross-drainage into the permit. The current definition of outfalls in the permit does not clarify that roadway cross-drainage or pass through drainage, does not qualify as an outfall. This issue was initially discussed during the Triennial Review comments and later upon submittal of the ADOT Phase I / Phase II maps in 2005. A statement was included by ADEQ in the Fact Sheet, but this statement should also be included in the permit itself since that is the regulating document.

RESPONSE NO. 6: ADEQ considers that the definition itself implicitly excludes "pass through drainage or cross-drainage" (assuming other pollutants are not added by intervening facility processes or discharges). ADEQ considers that the following part of the definition applies in this instance, *"does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States."* However, as requested for clarification, the explanatory note in the Fact Sheet has been added to the definition of 'outfall' in the permit.

Specific Comments

COMMENTS NO. 7, 8, 9: Minor corrections to Fact Sheet, p. 14 and 18 of permit

RESPONSE: Corrections were made as requested.

COMMENT NO 10: Section 5.2.3.2(b)(iii)(2)(a)(i)(c) – Sediment Basins
The requirement that "Temporary basins shall be maintained until final stabilization of disturbed drainage area." may not be feasible after the completion of construction. Temporary basins are just that, temporary. Please insert "If 'temporary' sediment basins are to be used as/converted to retention or detention basins in the post-construction phase, the operator shall remove and properly dispose of all sediments accumulated in the basin during construction activities prior to filing an NOT."

RESPONSE NO. 10: This provision applies only to 'temporary' basins on a construction site. ADOT should not interpret the permit language in Section 5.2.3.2(b)(iii)(2)(a)(i)(c) as preventing it from converting temporary basins to permanent retention or detention basins, if so desired. Rather,

the language is meant only to convey that temporary basins being used as a BMP must be maintained.

The language ADOT is requesting is already in the Construction General Permit and therefore will apply to ADOT's contractors before they submit an NOT and turn the property back to ADOT for final stabilization. If ADOT wishes to make a basin a permanent structure, this provision no longer applies and the basin will be maintained after site closure under the post-closure provisions of the permit.

No change was made to the permit as a result of this comment.

COMMENT NO 11: Section 5.2.5.5(h) – Construction Compliance Evaluation Reports [ADOT recommends] that this be rewritten: "The corrective action(s) required, including any necessary changes to the SWPPP, corrective actions performed and implementation dates;..."

RESPONSE NO 11: Correction made as requested.

COMMENT NO. 12: Section 6.2 contradicts with the condition in Section 6.5.1.1. ADOT requests that the 12 month time frame be included in 6.5.1.1.

RESPONSE NO. 12: Correction made as requested.

COMMENT NO. 13: Section 6.5.l.2b — This requirement conflicts with that of Section 6.1.3.

RESPONSE NO. 13: In response to the comment, Section 6.1.3 was deleted. No change was made to Section 6.5.1.2(b). To clarify, Section 6.5.1.2(a) specifies that a permit modification is needed to add any new industrial facility (i.e., those that would otherwise be subject to the MSGP). For these facilities, ADOT is to obtain a permit modification prior to discharge. See also Section 11.13 (Standard Conditions) and A.A.C R18-9-B906(A). The only exception to this is for Material Source sites.

Section 6.5.1.2(b) allows ADOT to operate a new Material Source site under the provisions of this permit with prior ADEQ approval; a formal permit amendment is not needed in this case. This provision recognizes the relatively flexible nature, and potential movement, of material source areas around the state.

COMMENT NO. 14: Section 6.1.3, Table 9.2 — The condition in the table differs from the one in the permit text. Please correct the time allowed to match that in 6.5.1.2b.

RESPONSE NO. 14: The comment refers to Table 9.2 in Section 9.1.3 of the permit (Schedule for Submittals) which summarizes the requirement in Section 6.1.3. Consistent with the previous comment, Section 6.1.3 was deleted from Table 9.2 and reference to 6.5.1.2(b) was added in its place.

COMMENT NO. 15: [Section 12, Definitions] Material Source Joint-use Sites definition — The second sentence needs to be clarified. ["ADOT has no control over the either the joint-use site or other operators at that site who are not working on ADOT projects."]

RESPONSE NO. 15: ADEQ agrees that the second sentence in the definition of Material Source Joint-use Sites is vague and does not substantially contribute to the provision. Therefore, the second sentence was deleted from the permit language.

The following comments were received on July 25, 2008 from the City of Flagstaff:

COMMENT NO. 1: In general, throughout the permit, the permit language should specifically state that this is ADOT's discharge permit and it does not, nor is it intended to, provide permit authority outside of their jurisdictional boundary . . . The permit language needs to state more specifically that ADOT's authority applies to their own, individual MS4 only, and that ADOT does not have regulatory authority over adjacent communities and their related MS4s.

RESPONSE NO. 1: ADEQ is issuing to ADOT a permit to discharge from ADOT's MS4 system, and from ADOT industrial and construction sites. One of these sites permitted herein, for instance an ADOT construction activity, may be performed in an area regulated by another MS4 entity. In such case, this permit does not negate the authorities of the MS4; just as any other construction activity permitted under the Construction General Permit in the area may still be subject to MS4 requirements.

Further, this permit is not intended to convey special privileges or new authorities to ADOT or to expand its jurisdictional area. There may be cases, however, when another MS4 or municipal entity requires an encroachment permit from ADOT, or discharges to the ADOT MS4 system. .

No change was made to the permit as a result of this comment.

COMMENT NO. 2: Many of the authorized stormwater discharges listed in table 1.3 have very little to do with a linear structure such as a state highway system. ADOT should concentrate their operational focus so as to be strategically positioned to respond to point source discharges and hazardous materials spills.

" . . . the permit language should be far more specific to their [ADOT's] individual circumstance of linear boundary highway structure and deal only with circumstances that would be specific to highway applications."

RESPONSE NO. 2: ADOT's statewide activities (and responsibilities) extend well beyond dealing with hazardous material spills and point source discharges. ADOT generates and discharges pollutants via the non-stormwaters identified in Table 1.3. This table was created to specify discharges that ADOT and ADEQ have agreed are authorized under this permit from the ADOT's MS4, industrial facilities and construction activities. In part, the Fact Sheet says:

> "This permit covers a diversity of activities and locations throughout the state from which stormwater discharges associated with construction, industrial and municipal activities may occur . . . ADEQ determined that many of the traditional application components required

> per A.A.C. R18-9-B901 . . . [were] . . . not essential for determining appropriate permit conditions for ADOT's current activities . . .
>
> "[ADEQ] recognized ADOT's unique qualities as an MS4, because its discharging activities resemble those of a municipality, an industry, and a construction site operator. In other words, ADOT's activities require AZPDES permit coverage for three main classes of stormwater discharges: municipal separate storm sewer system, industrial activity, and construction activity."

The Fact Sheet thoroughly explains that the scope of the permit covers more than just runoff from roadways.

No change was made to the permit as a result of this comment.

COMMENT NO. 3: Pages 78 — 80 reference wet-weather monitoring. This may establish a precedent that becomes incumbent upon the adjacent Phase II communities to adhere to an increased monitoring standard that is not included in our own individual permit requirements and not funded by our current budget authorization. Imposing monitoring standards adversely affects those who are not a part of the ADOT highway structure. This same concern applies to the First Flush requirement in section 8.7.2.3. "ADOT shall design sampling efforts with an attempt to include the "first flush" (first 30 minutes of stormwater discharge) of a representative storm event whenever possible to do so." This requirement has already been incorporated in ADOT's Stormwater Requirements for External Parties and interpreted beyond the jurisdictional boundary of ADOT's infrastructure (see attached ADOT Stormwater Requirements for External Parties).

RESPONSE NO. 3: The Phase II communities are subject to a statewide general permit that is scheduled to be renewed in the upcoming year. It is not anticipated that ADOT's individual Phase I permit will directly affect any terms of the new general permit. It has not yet been determined what monitoring provisions, if any, will be proposed in the Phase II general permit for the next renewal term. However, if stormwater monitoring were included, the draft would likely include sampling to include the 'first flush'; similar to the language in this permit, as this is a technically appropriate requirement. In any event, those subject to the new general permit will have opportunity to review and comment on any of the proposed conditions during the MS4 General Permit renewal process.

ADOT's "*Stormwater Requirements for External Parties*" appear to be limited to those that are on ADOT's properties, are subject to encroachment permits, or discharge into ADOT's storm sewer system. As ADOT has responsibilities under the Clean Water Act for the quality of what discharges *from* their system, it is appropriate, and is in fact mandated that they monitor and regulate as necessary, discharges *to* their system. This is true for any operator of an MS4 system, not just for ADOT.

No change was made to the permit as a result of this comment.

COMMENT NO. 4: Section 3.2.2.4 states "ADOT shall implement an Intra- and Inter-Governmental coordination program that shall include coordination mechanisms and program enforcement procedures among divisions, groups, sections, and districts within ADOT to ensure compliance with the terms of this permit". While we are glad to cooperate with ADOT and other

agencies, please consider that we each have specific ordinance language, council and or board of supervisor approval requirements that will make it unlikely that we can coordinate enforcement programs and procedures. We suggest revising this to state that "ADOT shall develop cooperative working relationships with other MS4 communities."

RESPONSE NO. 4: The permit language the commenter refers to is a requirement for ADOT to coordinate its internal activities to comply with the permit. It also motivates ADOT to open a dialog to coordinate programs, mechanisms and procedures and implement programs with neighboring Phase I and II MS4s. The purpose of this is an attempt to unify efforts across political boundaries where ADOT's roadway system cross Phase I and Phase II MS4s to keep pollutants out of stormwater by removing them as close to the source as possible. ADEQ recognizes all MS4s have unique ordinances and for this reason, the permit requirement is not prescriptive in terms of specific programs, mechanisms and procedures. However, in response to the comment, the permit language has been modified for increased clarity.

COMMENT NO. 5: Section 3.2.3.2 states that statewide ADOT has only 71 major outfalls statewide. This number seems low. Additionally, in sub section 3.2.3.2.a.ii the permit states "Within the first 12 months from the effective date of this permit ADOT will develop and submit to ADEQ a proposal including a schedule to identify all outfalls in the phase II municipalities . . ." This language seems vague and may contribute to the perception of broad authority over adjacent Phase II municipalities. We are glad to share our infrastructure inventory with ADOT, however, it appears that this language gives ADOT assumed authority that is not appropriate. Acceptable alternate language is "ADOT will work cooperatively with Phase II municipalities to obtain a copy of the immediately-adjacent-infrastructure inventory."

" . . . it is important that jurisdictional authority is clear and that the permit cannot be interpreted to impose additional reporting requirements on the adjacent Phase I & Phase II communities. Smaller Phase II communities should not have to incur increased costs of compliance to adhere to permit standards outside ADOT's statutorily defined jurisdiction."

RESPONSE NO. 5: ADOT reports that they have only 71 major outfalls; this is why this number is included in the permit. It is possible that more will be identified in the future.

Again, the permit does not authorize ADOT to exert authority beyond its own jurisdiction. However, ADOT's discharging activities extend throughout Arizona, and therefore, are considered to fall under both the Phase I and Phase II regulations. The referenced permit language, when understood in proper context, requires ADOT to inventory **ADOT's own outfalls** within Phase II municipalities it crosses. The permit does not require ADOT to inventory outfalls of a neighboring Phase II (such as Flagstaff), in addition to its own.

No change was made to the permit as a result of this comment.

COMMENT NO. 6: A final observation is that the permit language contained in pages 14 through 99, while extremely well written and comprehensive, would be more appropriately contained in the SSWMP rather than in the actual individual permit itself. This again contributes to our concerns that costly requirements, such as stormwater treatment systems may be required of the adjacent Phase II communities.

RESPONSE NO. 6: ADEQ considers the substantive and enforceable parts of the permit are best specified within a permit and public noticed as a part of the permit. In so doing, these provisions are drafted in a way that clearly reflects ADOT's obligations and ADEQ's expectations. Placement within the SSWMP may or may not have the same outcome, depending on the wording, context, and placement. Additionally, ADOT's SSWMP to fully comply with this permit has not yet been developed. Despite where these requirements are placed, ADEQ does not anticipate that language in ADOT's permit should result in "costly stormwater treatment systems" in adjacent Phase II communities.

No change was made to the permit as a result of this comment.

The following comments received on July 28, 2008 from the Arizona Chamber of Commerce and the Phoenix Chamber of Commerce:

COMMENT NO. 1: "ADEQ Should Not Finalize the Draft Permit without Further Stakeholder Participation and an Additional Draft CGP. ADEQ posted notice of the Draft Permit on June 26, 2008. From that time until the close of the comment period (July 28, 2008), ADEQ has not, to the Chamber's knowledge, held any public meetings to discuss the Draft Permit beyond meetings with ADOT. ADEQ has stated, regarding the Draft Permit: "This permit is the first of its kind in Arizona." See Draft Fact Sheet, pp. 2. Such an unprecedented permit requires increased stakeholder involvement. This Draft Permit will impact many citizens, municipalities and industries throughout Arizona. ADEQ should therefore seek input from a wide-range of stakeholders to formulate a fair and comprehensive permit. ADEQ could, where necessary, administratively extend current permits under which ADOT and its contractors operate to allow for greater stakeholder participation and feedback without risking a permitting gap. The Chamber recommends that ADEQ administratively extend, for an additional 30 days, the Phase I Municipal Separate Storm Sewer System ("MS4") permit under which ADOT currently operates. ADOT, its contractors, and other parties could continue to operate under the current Construction General Permit ("CGP') and the administratively extended Multi-Sector General Industrial Permit ("MSGP") for stormwater discharges whenever applicable. During the extended 30-day period, ADEQ should seek stakeholder involvement in public meetings. ADEQ should then reissue a draft permit for public comment after the 30-day period. Increased stakeholder involvement will help avoid otherwise inevitable pitfalls associated with the implementation of an unprecedented permit.

RESPONSE NO. 1: ADEQ emphasized in the Fact sheet that this permit was unique in an attempt to explain the scope of the permit as it impacts ADOT's operations to interested parties and for the public record. However, ADOT is being issued an individual permit, not a general permit. The permit process for an individual permit involves discussions with the applicant, but does not typically involve public meetings prior to publication of a draft permit. The public involvement requirements are in A.A.C. R18-9-A908, which specifies the Director may decide to hold a public hearing if significant public interest exists and a hearing is requested during the comment period. Although we acknowledge your comment, ADEQ did not receive any requests for a public hearing on this permit.

ADOT and ADEQ held numerous meetings to discuss the permit and negotiate permit language. This is appropriate as it is ADOT that is expected to comply with the permit. ADEQ believes that all comments have been adequately and appropriately addressed.

No change was made to the permit as a result of this comment.

COMMENT NO. 2: ADOT Contractors Should Not Be Required to Obtain Stormwater Discharge Permits if Already Subject to this Draft Permit

ADEQ states in its draft Fact Sheet published in connection with the Draft Permit: "ADOT currently contracts out much of the work performed on behalf of the agency. However, ADOT's responsibilities include ensuring work done on their behalf complies with environmental laws." Draft Fact Sheet, pp. 3. ADEQ further states that the Draft Permit clarifies ADOT's oversight roles, and that the definition of "ADOT" specifically includes contractors working on behalf of ADOT. Id. However, as ADEQ states, ADOT's contractors on construction projects must still obtain coverage under, and comply with, the CGP. Id. Requiring these contractors to obtain CGP coverage when already regulated by the Draft Permit is unnecessarily redundant. These contractors would already be subject to Draft Permit conditions and would have to implement Stormwater Pollution Prevention Plans ("SWPPPs") which would adequately protect the environment without the administrative burden and expense, on both the contractor and ADEQ, necessitated by compliance with the CGP. The Chamber therefore requests that permit coverage under this Draft Permit, whether by ADOT or its contractors, obviate the need for any additional stormwater permitting, including coverage under the CGP. In the alternative, ADEQ should expressly state that ADOT construction contractors with CGP coverage are not subject to enforcement in connection with this Draft Permit, so long as they are in substantial compliance with the CGP and the SWPPP prepared under the CGP. Similarly, ADEQ should exempt contractors operating industrial facilities, including material source sites not under ADOT control, that are already covered under an industrial stormwater permit, from enforcement under the Draft Permit.

RESPONSE NO. 2: ADEQ disagrees that requiring contractors to obtain coverage under the CGP is redundant with this permit. ADEQ did not include all the provisions and Best Management Practices that are appropriate and necessary for construction projects in this permit. Those provisions are specified in depth within the CGP; to make this the only applicable permit would have required adding all relevant provisions of the CGP to ADOT's permit. This would unnecessarily and significantly increase the size and complexity of this permit. Operators of construction projects continue to be appropriately permitted under the CGP, and the ADOT permit adds additional details where gaps exist, or where shortcomings in ADOT's construction program activities have been noted. It also clarifies some logistical issues within the CGP as it pertains to ADOT. (For example, the permit now allows contractors to file an NOT, before final stabilization by reverting the project back to ADOT for completion and establishment of vegetation, etc.)

With respect to the MSGP, contractors that operate industrial facilities, including material source sites, which are not under ADOT control, are not subject to this permit. This permit only covers material source sites and concrete and asphalt batch plants under *exclusive* ADOT control. At such sites, ADOT is not required to obtain a separate MSGP coverage but is instead subject to the provisions of this individual permit. ADEQ expects all contractors that provide contract services from their own properties (not controlled by ADOT) that have activities subject to the MSGP, to obtain their own permit coverage under the MSGP

ADEQ has reviewed the commenter's concern about enforcement under this permit as it relates to ADOT contractors. ADEQ has simplified the definition of 'ADOT" in attempt to clarify this relationship. ADOT as an agency has responsibilities under this permit and this includes requiring

its contractors to comply with provisions of this permit as appropriate. ADEQ envisions such requirements would be clarified contractually between ADOT and its contractors. ADOT is directly responsible for compliance with this permit. Although construction contractors of ADOT can be held responsible under the CGP, it is not ADEQ's intention to enforce the conditions of this permit against ADOT contractors. Instead, ADOT has responsibility to monitor its construction site activities and provide necessary oversight to ensure the terms of this permit are met.

<u>COMMENT NO 3</u>: ADEQ Should Revise the Draft Permit to Avoid Exceeding its Statutory Authority.

ADEQ has promulgated the Draft Permit under Section 402 of the federal Clean Water Act ("CWA"). 33 U.S.C. § 1251 et seq. The CWA applies only to "navigable waters", defined as "waters of the United States." 33 U.S.C. § 1362(7). As such, ADEQ's authority in regulating discharges under the Draft Permit is limited to the scope of the CWA, which applies only to "navigable waters." Further, because ADEQ promulgates the Draft Permit under its delegated AZPDES permit program, ADEQ cannot adopt any aspect of the standards that "is more stringent than . . . any requirement of the federal] clean water act." A.R.S. § 49-255.01(B).

Recently, the U.S. Supreme Court clarified the scope of the CWA and the meaning of "navigable waters" in Rapanos v. United States. 126 S.Ct. 2208 (2006). In Rapanos, the Court reversed the lower court decision upholding CWA jurisdiction over waters with an attenuated relationships [sic] to traditional "navigable waters". The decision in Rapanos came after years of disputes between the regulated community, the U.S. Environmental Protection Agency ("EPA"), state environmental agencies regulating pursuant to the CWA, and the U.S. Army Corps of Engineers (the "Corps") regarding the scope of the CWA.

The decision in Rapanos was a plurality decision, in which a majority of the justices failed to agree on a single, unifying theory for the limitation on CWA jurisdiction. However, the plurality opinion, written by Justice Scalia and supported by four members of the Court, stated that the CWA jurisdiction extended over tributaries of traditional navigable waters but only if such tributaries are "relatively permanent, standing or continuously flowing bodies of water." The plurality opinion further clarified that CWA jurisdiction did not extend to tributaries "through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Rapanos 126 5. Ct. at 2225.

Justice Kennedy wrote a concurring opinion, in which he also rejected the Corps' assertion of CWA 404 jurisdiction; however, Justice Kennedy rejected jurisdiction based on an entirely different standard. Justice Kennedy stated that CWA jurisdiction extends only to tributaries and wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.' Rapanos 126 S. Ct. at 2236.

ADEQ does not address the questionable jurisdictional status under the CWA of certain waters ADEQ intends to regulate under the Draft Permit. For example, ADEQ requires that operators identify in their SWPPPs the "nearest receiving water(s), including wetlands, ephemeral and intermittent streams, din, washes, and arroyos." [emphasis added]. Draft Permit Sections 5.2.1.5(e) and 6.2.7(e). Dry washes and arroyos arguably lie outside the scope of CWA jurisdiction, and by extension, ADEQ's AZPDES permitting authority. Furthermore, 'dry washes and arroyos" generally do not satisfy the plurality test in Rapanos – they are not relatively permanent tributaries to traditional navigable water. Even if ADEQ purports to base its jurisdiction on Justice Kennedy's

"significant nexus" test, ADEQ provides no information supporting that dry washes and arrays [sic] have a significant nexus to traditional navigable waters. Indeed, EPA issued guidance in light of Rapanos explaining the scope of the CWA on June 5, 2007. This guidance expressly excluded swales and erosional features, such as dry washes and arroyos, from CWA jurisdiction. In any event, the distinction between "dry washes and arroyos" and "ephemeral streams" is unclear, and using the term "dry washes and arroyos" together with "ephemeral streams" serves only to confuse permittees.

The Draft Permit therefore inappropriately (and ambiguously) references receiving waters such as dry washes and arroyos. As such, the Chamber requests that ADEQ delete all references to "dry washes and arroyos" because of their questionable jurisdictional status. These suggested revisions would allow ADEQ to avoid extending its regulatory authority over waters deemed non-jurisdictional in light of Rapanos, and thus ensure that this Draft Permit complies with applicable law and does not exceed ADEQ's statutory authority.

RESPONSE NO. 3: As noted in the comment, *Rapanos* was a plurality decision (i.e., Supreme Court justices could not agree and issued five separate opinions, with no single opinion commanding a majority of the Court). Further, *Rapanos* was a decision that applies to wetland jurisdiction under Section 404, not streams subject to the NPDES program under Section 402 of the CWA ADEQ continues to implement the Clean Water Act and tributary rule and other CWA authorities that remain in effect. As specified in the authorization page of the permit, the scope of this permit extends to discharges to Waters of the U.S. Note also there is a severability provision in Section 11.25 of the permit should any condition ultimately be held invalid.

No change was made to the permit as a result of this comment.

COMMENT NO. 4: ADEQ Should Revise Draft Permit Provisions Relating to Non-Stormwater Discharges.
Section 1.2.1 of the Draft Permit states that the permit does not authorize any non-stormwater discharges to receiving waters listed as impaired or any waters listed as "unique" under A.A.C. RI 8-11-112. However, under Section 1.3 of the Draft Permit, ADEQ expressly authorizes certain non-stormwater discharges, so long as (i) such discharges are the result of ADOT activities, (ii) such discharges are not identified by ADOT or ADEQ as significant sources of pollutants; and (iii) ADOT implements effective "best management practices" ("BMPs"). These authorized non-stormwater discharges are so authorized because of their benign nature. The benign nature of these discharges, coupled with the conditions on those discharges under Section 1.3.2 (including the requirement to implement BMPs) provides adequate protection to unique and impaired waters. As such, the Chamber recommends that ADEQ revise Section 1.2.1 to allow for non-stormwater discharges to unique or impaired waters consistent with Section 1.3 of the Draft Permit, and delete Section 1.3.3 which prohibits all nonstormwater discharges to unique and impaired waters.

RESPONSE NO. 4A: Discharges to unique or impaired waters require individual review and discharge-specific conditions are applied as necessary. This is the preferred regulatory method for dealing with these discharges to ensure an understanding of what the circumstances of discharge are, and that they are in fact, 'benign'. As there is already a mechanism in place, such discharges are not authorized under this permit. Addition of appropriate conditions from the DGP would have resulted in an unnecessary increase in both the length and complexity of this permit. ADOT may,

however, choose to apply for coverage under the DGP to obtain approval if it needs to discharge to such waterbodies.

No change was made to the permit as a result of this comment.

Additionally, the Draft Permit authorizes certain non-stormwater discharges such as water used for routine external washings of buildings, tunnels, or signs, so long as ADOT uses no detergents, chemical additives, or other toxic cleaning agents. See Draft Permit, Table 1.3. This same non-stormwater discharge authorization should apply to water used to wash vehicles where the permittee does not use detergents, additives or toxic cleaners. The Chamber understands that ADEQ excludes such authorized nonstormwater discharges from authorization under the Draft Permit to be consistent with Aquifer Protection Permit ("APP") strictures requiring general APP permitting for vehicle wash-water discharges to groundwater. However, Arizona's Unified Permit Steering Committee determined that APP and AZPDES programs be kept on separate tracks. The Draft Permit should authorize vehicle wash water discharges to surface waters (which, without detergents or other chemical additives, would be largely harmless and checked by effective BMPs), while still clarifying that operators must meet APP requirements for discharges to groundwater.

RESPONSE NO. 4B: The APP and AZPDES permit programs remain on a separate track; however, determinations made in both programs must be not be inconsistent with each other. It is illogical to expect ADEQ to knowingly authorize a provision in one water quality permitting program that violates the rules of another water quality permitting program. The discharge of vehicle wash water, even without detergents, additives or toxic cleaners, is subject to the general permit provisions of the Aquifer Protection Permit program in A.A.C. R18-9-D303. This Type 3 general APP permit prohibits discharge to the surface, but instead requires vehicle wash waters to report to an engineered subsurface disposal system or to a lined, non-discharging surface impoundment. Surface discharge under this permit would be incompatible with these provisions.

No change was made to the permit as a result of this comment.

The Draft Permit requires ADOT (and by extension, its contractors) to "eliminate or reduce discharges of non-stormwater to the maximum extent feasible." Section 1.3.5. The term "feasible" suggests technical feasibility without consideration of cost. The Draft Permit is vulnerable, therefore, to an interpretation requiring implementation of any technically feasible means to prevent non-stormwater discharges (no matter how benign) without regard to the economic burden of implementing such controls. The Chamber therefore requests that ADEQ revise Section 1.3.5 of the Draft Permit to require the elimination or reduction of non-stormwater discharges "to the maximum extent practicable" to avoid impractical and costly discharge prevention requirements for benign non-stormwater discharges. Considerations of practicality, as opposed to only considerations of technical feasibility, include a cost-benefit analysis of BMP implementation. Additionally, this recommended change in language would be more consistent with ADEQ's approach elsewhere in the Draft Permit. See Sections 1.2.2.2, 3.1.1.1, and 3.1.6.

RESPONSE NO. 4C: "Maximum extent practicable" (MEP) is a Clean Water Act term of art that has specific application within the MS4 stormwater program. MEP is a standard that does not apply to discharges from construction sites or industrial sites or any other aspect of the NPDES program. Thus, to avoid confusion, ADEQ does not use this term outside the context of the MS4. However,

in review of this comment, ADEQ has slightly modified the language to *"eliminate or reduce discharges of non-stormwater to the extent feasible*".

COMMENT NO. 5: ADEQ Should Revise Draft Permit Sections to More Appropriately Address Exceedances of Surface Water Quality Standards.

Under Sections 1.2.2 and 1.2.3 of the Draft Permit, ADEQ expressly states that the permit does not authorize discharges which cause or contribute to non-attainment of surface water quality standards or which are inconsistent with established total maximum daily loads ("TMDL"). This section deviates sharply from the federal CGP and MSGP, as well as settlements reached in negotiations over the proposed reissued MSGP, and is redundant with protections already in place in Section 7 of the Draft Permit. ADEQ should track current permitting practices and honor MSGP settlement negotiations on the 2006 MSGP by deleting this section. In the alternative, the Chamber recommends the following language be included in lieu of Sections 1.2.2 and 1.2.3, consistent with MSGP settlement negotiations and current federal CGP permitting approaches to discharges to impaired waters:

> 1.2.2. Water Quality Standards and TMDLs. At any time after authorization ADEQ may determine that your storm water discharges may cause or contribute to an exceedance of applicable water quality standards or is otherwise inconsistent with an established TMDL. If such a determination is made, ADEQ may require you to:
>
> a. Developer [sic] a supplemental BMP action plan describing SWPPP modifications intended to address discharges causing or contributing to exceedances of applicable surface water Quality standards or which are inconsistent with established TMDLs:
> b. Submit valid and verifiable data and information that are representative of ambient conditions and indicate that the receiving water is attaining water quality standards or that discharges are consistent with established TMDLs; or
> c. Cease discharges of pollutants from construction activity and submit an individual permit application.

Additionally, to be consistent with approaches taken elsewhere in the Draft Permit, ADEQ should revise Section 7.2.1 to read: "ADOT shall protect water quality by that no discharge reducing. to the maximum extent practicable, any discharge from industrial or construction activities that ~~may cause or contribute~~ causes or contributes to an exceedance of any applicable Arizona surface water quality standard." The requirement to 'ensure" that discharges do not cause or contribute to exceedances of surface water quality standards is fundamentally inconsistent with the concept of an iterative, BMP-based approach to controlling stormwater Short of containing all potential stormwater runoff (a virtual impossibility in most cases), operators could not "ensure" that discharges do not cause or contribute to an exceedance of surface water quality standards. To avoid this inconsistent approach, the Chamber recommends that ADEQ make the revisions to Section 7.2.1 set forth above. Similarly, ADEQ should remove the word "ensure" and the language that follows that word from Section 7.2.1.2, and replace it with "reduce, to the maximum extent practicable, future discharges that cause or contribute to an exceedance of any WQS."

RESPONSE NO 5: ADEQ is unclear about the commenter's reference to "MSGP Settlement Negotiations on the 2006 MSGP". ADEQ did not participate in any negotiations on the federal MSGP permit. Further, any previous discussions on preliminary drafts of Arizona's MSGP permit should not be construed as agency commitments because the formal permitting process on this

permit has not yet been initiated. Regardless of the status of the general permits, the ADOT permit is an individual permit, and the provisions may differ from language in a general permit. The commenter's suggested language from the CGP (i.e., the suggestion to cease discharging from construction activities and submit an individual permit application) does not make sense in the context of this permit which is already an individual permit.

Further, per 40 CFR 122.5, no NPDES permit can be issued when the conditions of the permit '*do not provide for compliance with the applicable requirements of the CWA or regulations promulgated under the CWA'*. And, no permit may be issued if the '*discharge will cause or contribute to the violation of water quality standards'*. See also 40 C.F.R. § 122.44(d)(1). The language in the draft permit is entirely consistent with these regulations. In accordance with the Clean Water Act, the "Maximum extent practicable" language where used in ADOT's permit applies only to ADOT's *MS4 discharges*. It does not, and cannot, extend to discharges from industrial or construction sites; these facilities may not cause or contribute to violations of water quality standards.

No change was made to the permit as a result of these comments.

COMMENT NO. 6: ADEQ Should Delete Section 2 Regarding ADOT's Enforcement Authority. ADEQ requires ADOT to 'utilize the powers delegated to it by the Arizona Legislature through A.R.S. Title 28 to control and enforce the release of pollutants to and discharges from the municipal separate storm sewer that is owned or operated by ADOT" under Draft Permit Section 2.0. ADEQ, however, does not explain how Title 28 authorizes ADOT to enforce discharge permit conditions. Indeed, there is no language in Title 28 suggesting that the Arizona Legislature has delegated authority to ADOT to adopt or enforce environmental regulations or permits regarding water quality. ADEQ's approach in Section 2 of the Draft Permit suggests that an ADOT contractor or anyone discharging to ADOT's MS4 would be subject to the threat of dual enforcement from both ADEQ and ADOT. ADEQ expands on this approach in Section 3.2.3.1, which requires ADOT to continue to insure that sufficient legal authority is maintained to prohibit and eliminate illicit discharges" to ADOT's MS4. If the Arizona Legislature had truly delegated such legal authority to ADOT, then ADOT should not have to "continue to insure" that it has sufficient legal authority. Such insurance would have already been provided by the Arizona Legislature. The language in Section 3.2.3.1 would be extraneous if ADOT had clear legal authority to enforce and promulgate discharge regulations. In any event, it is unclear how ADOT could provide such "insurance" against future contrary legislation, even assuming ADOT had such delegated authority to begin with. ADEQ should therefore delete Section 2 and Section 3.2.3.1 to avoid unnecessarily duplicative enforcement mechanisms and to clarify the otherwise questionable statutory basis for the enforcement authority ADEQ claims for ADOT. In the alternative, ADEQ should provide a more detailed explanation for its claim that ADOT has authority to enforce and promulgate water quality regulations and how ADOT would "insure" it retained that authority.

RESPONSE NO 6: The Clean Water Act and the Stormwater regulations in 40 CFR 122.26(d)(2) require large MS4s (Phase 1 MS4s) to have adequate legal authority to control discharges to its system and otherwise implement [and enforce] its permits. The language in Part 2 reflects the requirements of the regulations. ADOT's legal representatives proposed slight modifications in the language of a pre-publication draft based on ADOT's legal authorities and unique status as an MS4. ADEQ's legal representatives reviewed and accepted ADOT's language as consistent with the regulations.

No change was made to the permit as a result of this comment.

COMMENT NO. 7: ADEQ Should Revise the Draft Permit Definitions in Section 12.
The Chamber requests that ADEQ revise the Draft Permit's Section 12 to clarify certain definitional issues. First, ADEQ should define the term 'maintenance facility" as used in Section 4 to apply only to facilities, such as those identified in Section 4.2 which are owned or operated by solely ADOT for purposes of maintaining vehicles and equipment used in connection with ADOT operations. Second, the Draft Permit uses in several instances the term 'receiving waters", but does not define that term. The Chamber recommends that receiving waters be defined as "navigable waters" and MS4s.

RESPONSE NO 7: The maintenance facilities regulated in this permit are those owned and operated by ADOT. As ADOT understands what these facilities are, and has a maintenance facility program to address these, it does not need further definition within the permit.

"Receiving Water" *is* already defined in the permit**.** It means a "Water of the United States as defined in 40 CFR 122.2 into which the stormwater discharges."

No change was made to the permit as a result of this comment.

COMMENT NO. 8: ADEQ Should Clarify that Draft Permit Sections Relating to Impaired Waters Address Only Impaired Waters, not Non-Attaining Waters.
In the Draft Permit Fact Sheet, ADEQ suggests that permit conditions addressing impaired waters address, in equal measure, all non-attaining waters. See Draft Permit Fact Sheet, pp. 5. These permit sections should address only impaired waters, not all non-attaining waters. Non-attaining waters may be addressed under Category 4(b) of the CWA 303(d) list, meaning that an effective remediation method has been, or is being, implemented. Additionally, many waters are non-attaining due to natural background. As such, imposing increased monitoring and reporting requirements on discharges to all non-attaining waters unnecessarily burdens operators in instances where they are either already cleaning the water or where the receiving water exceeds water quality standards due to natural conditions. Such requirements dilute the attention and resources of ADEQ from truly impaired waters. The Chamber recommends, therefore, that ADEQ clarify that Draft Permit conditions intended to regulate impaired waters do not regulate all non-attaining waters.

RESPONSE NO 8: The permit language is clear in its intentions where it specifies impaired, or non-attaining waters, or both. The commenter is correct that non-attaining waters may be addressed under Category 4(b) of the CWA 303(d) list, and a remedy may be on-going. However, that does not mean that additional loads of that pollutant causing impairment would not be of concern. Even if receiving waters exceed standards due to natural conditions, generally they do not have the assimilative capacity to receive additional pollutant load from anthropogenic sources.

No change has been made in response to the comment.

COMMENT NO. 9: ADEQ Should Revise the Draft Permit to Provide Greater Flexibility with Respect to BMP Maintenance.

The Draft Permit requires certain BMP maintenance or repair to occur within five days of discovering any BMP failure and before the next anticipated storm event. See, e.g. Draft Permit Sections 4.2.5 and 5.2.4.2. However, in many instances, repairs to BMPs (such as silt fences) require scheduling with subcontractors who have the necessary parts and expertise to effectively maintain and repair BMPs. Also, many sites are located in remote areas which prevent subcontractors from arriving within five days of discovery to repair BMPs. The Chamber therefore recommends that BMP maintenance and repair timeframes be revised to allow greater flexibility for maintenance and to take into account scheduling difficulties with subcontractors involved in BMP maintenance. Provisions in the Draft Permit relating to BMP maintenance time frames following discovery of a BMP failure or defect should therefore be deleted and instead replaced with the following language:

> All BMPs identified in the SWPPP or required by this permit must be maintained in effective operating condition. If site inspections required by this permit identify BMPs that are not operating effectively, maintenance must be performed as soon as possible and before the next storm event whenever practicable to maintain the continued effectiveness of storm water controls.

RESPONSE NO 9: The commenter's proposed language is virtually identical to that in 6.8.4.3 of the draft permit. However, in response to the comment, ADEQ is revising permit condition 4.2.5 to require that BMP repairs be completed *within 7 days* and before the next anticipated rain event. This timeframe was incorporated in the final CGP. During the public comment period for the CGP, ADEQ received many comments about the proposed timeframes (which were considerably shorter than 7 days). Discussions with stakeholders concluded that in most cases, 7 days was adequate time to obtain repairs, even when subcontractors are needed.

In review of this language, ADEQ also added the following provision to Sections 4.2.5 and 5.2.4.2: *If implementation before the next storm event is impracticable, the reason(s) for delay must be documented in the SWPPP and alternative BMPs must be implemented as soon as possible.* This language provides ADOT with additional flexibility when necessary.

COMMENT NO. 10: ADEQ Should Allow for Permit Waivers for Small Construction Projects. In the CGP, ADEQ allows for permit waivers for certain smaller construction projects, where the site operator has determined that the rainfall erosivity factor in the revised universal soil loss equation is less than 5, or where the operator certifies that stormwater controls are not needed based upon TMDL. However, in the Draft Permit, ADEQ states that "[p]ermit waivers for small construction projects as allowed under the Construction Stormwater General Permit are not allowed under this permit." Draft Permit Section 5.1.2. ADEQ provides no justification for this position, which is at odds with ADEQ's approach in the CGP. ADEQ should retain the option to grant permit waivers for smaller construction projects with low erosivity factors or which are otherwise exempt due to the low potential for any more than a de minimis discharge of pollutants, because such an approach would protect water quality while avoiding administrative burdens for the agency and regulated parties where the potential to impact waters of the United States is nil. ADEQ should therefore delete Section 5.1.2 of the Draft Permit and incorporate the permit wavier options for smaller construction projects provided in the CGP.

RESPONSE NO 10: ADOT and ADEQ agreed during the permitting process, that small projects may have impacts, and that ADOT's construction projects would not be subject to the waiver

provisions. ADOT is ultimately responsible for ensuring that projects done on its behalf meet ADOT standards. ADOT may choose to apply additional requirements in its contracts or other agreements that are in addition to or beyond the terms of this permit to ensure work is done in a manner acceptable to ADOT.

No change was made to the permit as a result of this comment.

COMMENT NO 11: ADEQ Should Not Require SWPPPs to Identify the Location of Drywells. The Chamber objects to the requirement to include the locations and registration numbers of on-site drywells in the site map for the SWPPP. See, e.g., Draft Permit Sections 5.2.1.5(f) and 6.2.7(f). This requirement is inconsistent with the decision made by the Unified Permit Steering Committee to keep the APP and AZPDES permit programs on a separate track. The Chamber therefore requests that ADEQ remove any requirements in the Draft Permit to identify the location of drywells in SWPPPs.

RESPONSE NO 11: The purpose of providing this information on the SWPPP is to collect information on drywells so as to identify potential stormwater receptors that could receive a discharge from an ADOT site. This is entirely consistent with the stormwater program, and may be important to understanding the stormwater system at a site. This permit does not impose substantive requirements for the management of stormwater to drywells.

Drywells are designed, installed, and intended for the management of stormwater discharges. Therefore, information within a stormwater permit about the presence of and protection of drywells is completely appropriate. Additionally, drywells have their own authorizing statutes and may or may not be subject to the APP program depending on the types of discharges they have potential to receive.

No change was made to the permit as a result of this comment.

COMMENT NO 12: ADEQ Should Revise Permit Provisions Relating to Discharges to Impaired Waters.
The Chamber strongly objects to ADEQ's inclusion in the Draft Permit of monitoring requirements for discharges to unique and impaired waters. See Draft Permit Section 8.4. ADEQ has arbitrarily included in the Draft Permit detailed and onerous monitoring requirements which go far beyond any permit conditions imposed in any prior stormwater permits issued either by ADEQ or EPA. ADEQ imposes these monitoring requirements without any stakeholder guidance on the serious impacts and unnecessary burdens associated with these permit conditions. By so doing, ADEQ capriciously ignores all prior approaches to stormwater discharge permitting taken by the state and federal government, eliminates essential flexibility by the permittee to address those contaminants of real concern to the impaired or unique water, and imposes costly requirements on permittees which would not serve to protect the receiving water.

For example, Section 8.4.3.1(b) of the Draft Permit imposes costly monitoring requirements for turbidity. ADEQ itself has removed turbidity from its triennial review of surface water quality, and no longer maintains a surface water quality standard for turbidity. ADEQ, in revising its surface water quality standards, called analytical approaches to turbidity monitoring 'scientifically indefensible" and "unreliable". See Volume 8, Issue 13, Arizona Administrative Register, pp. 1292-

1294 (March 29, 2002). ADEQ now ignores its own statements in imposing monitoring requirements for turbidity on permittees for all discharges to impaired waters, regardless of the contaminant causing the impairment to the receiving water.

For purposes of limiting coverage due to proximity to impaired waters, if the Draft Permit retains monitoring requirements, those monitoring requirements for construction activities should be limited to pollutants associated with construction activities, such as sediment, TSS, and siltation.

Finally, the Chamber disagrees with language in the Draft Permit authorizing ADEQ to "require" specific BMPs or monitoring to be implemented in association with potential discharges to impaired waters. This language suggests that ADEQ can mandate specific BMP design criteria. Such language removes the operator's flexibility to select appropriate BMPs to effectively minimize loadings of the pollutant causing the impairment. ADEQ must recognize that the Draft Permit is dealing with highly variable stormwater discharges at high flow conditions, not continuous wastewater discharges at low flow conditions. ADEQ should maintain the maximum amount of flexibility in terms of addressing such discharges and should focus on requirements to adopt appropriate (not "required") BMPs that will effectively minimize loadings of the pollutant of concern.

RESPONSE NO 12: In response, ADEQ notes this is not a general permit subject to widespread 'stakeholder' input. It is an individual permit developed with consideration of specific issues. In general, the monitoring required at asphalt batch plants and cement manufacturing can be eliminated by moving these typically mobile activities outside of the proximity of impaired or unique waters. This is a decision ADOT is free to make. Alternatively, ADOT may choose to perform the monitoring, or require its contractors to perform monitoring to meet the permit conditions. The monitoring provisions for these particular sectors are based on the fact they have Effluent Limitation Guidelines in 40 CFR 404, and as such, should be routinely monitored.

Additionally, monitoring of other construction activities in these areas also is required in the CGP that ADEQ issued February 28, 2008. The commenter correctly notes that turbidity is not currently a water quality standard; however, suspended sediment concentrations (SSC) is a WQS. ADEQ does have questions about application of turbidity, particularly as related to aquatic life impacts. For that reason ADEQ has previously proposed TSS monitoring as a condition of stormwater permits. However, at stakeholder request ADEQ agreed to allow analytical monitoring for turbidity as an indicator parameter. Turbidity monitoring is only required in this permit for projects in proximity to unique and impaired waters. Analytical monitoring for turbidity was included (versus total suspended solids, for example) because it is an inexpensive analytical method and should be adequate for reviewing BMP effectiveness. With relatively inexpensive equipment and minimal personnel training, this analysis can be and is typically conducted in the field.

ADEQ is not clear which section of the permit is being referenced in the final comment but it may be Section 6.5.1.4. ADOT has the opportunity to respond in various manners and propose various options in the event they are notified that a SWPPP is deficient. This provision only applies in the event ADOT has been previously advised of SWPPP deficiencies, but has not made revisions that are acceptable to ADEQ. In this event ADEQ may mandate certain requirements within the SWPPP documents.

No change was made to the permit as a result of this comment.

COMMENT NO 13: ADEQ Should Clarify Inspection Frequency Requirements for Anticipated Rain Events.
Draft Permit Section 5.2.5.2(b) requires routine inspections at least once each month anytime a 30% chance of rain is predicted. The Draft Permit provides no guidance on the source of these precipitation forecasts. Meteorologists consistently disagree on the chances for rain in a given area, and the chances for rain vary widely even from one part of a city to another. The Chamber recommends that ADEQ remove the increased inspection requirements where 30% chance of rain is forecasted, because it is ambiguous and impossible to determine (and therefore to enforce) effectively and consistently, and because the permanent stabilization and increased inspections following storm events already provided for in the Draft Permit adequately protect receiving waters from discharges related to storm events.

RESPONSE NO 13: ADEQ negotiated this language with ADOT. ADEQ anticipates that ADOT will determine a consistent and reasonable approach for compliance with this provision. ADEQ and ADOT will refine details relating to implementation of the provision should the need arise.

No change was made to the permit as a result of this comment.

COMMENT NO 14: The Draft Permit Should Allow Relaxed Sediment Control BMPs if the Site Relies on Strict Erosion Control BMPs and Vice Versa.
Under Sections 5.2.3.2(b) and 6.5.3.2(f) of the Draft Permit, ADEQ requires implementation of BMPs for erosion and sediment control. In many instances, however, the strict requirements for sediment and erosion control are unnecessary where BMPs for the only one are highly effective. The Chamber therefore recommends that ADEQ create a sliding scale requirement, where an operator may maintain extremely effective BMPs for erosion or sediment control, and therefore be allowed to operate under relaxed requirements for controlling the other. For example, if the operator maintains BMPs which are highly effective in controlling erosion, the Draft Permit should provide for relaxed BMP requirements for sediment control, as sediment would be largely addressed through effective erosion control. This approach creates greater flexibility for operators in addressing BMPs while still protecting receiving waters from high sediment discharges.

Additionally, Draft Permit stabilization requirements (such as those provided in Section 5.2.3.2) can present tremendously costly obstacles to permittees, and often go far beyond what is necessary or appropriate to a particular project protecting the integrity of the receiving water. Where project areas are barren or where no cover exists, or for road shoulders, those project sites should be permitted to terminate permit coverage by returning the site to its original conditions without strict revegetation requirements or soil amendments. In particular, the Draft Permit should provide that costly revegetation requirements may be avoided where the operators maintains appropriate levels of sediment control.

RESPONSE NO 14: Erosion controls continue to be the primary means of preventing stormwater pollution from construction activities. Sediment controls are also necessary as a secondary line of defense in addition to properly designed and installed erosion controls. Both are required to be implemented for an effective sediment control program.

Further, stormwater provisions already allow consideration of the density of natural vegetation on a site with respect to final stabilization, and the option to use alternative stabilization material other than vegetation (such as on road shoulders).

No change was made to the permit as a result of this comment.

COMMENT NO 15: ADEQ Should Clarify that the Draft Permit Scope Does Not Include Windblown Dust.

The Draft Permit requires operators to implement effective BMPs that ensure there is no discharge of sediments from construction activities during dry weather. However, it is possible for sites to discharge sediments during dry weather through windblown dust – discharges which are already addressed in air quality permits and which have little or no impact on surface water quality. ADEQ should clarify that sediment discharges during dry weather are only prohibited to the extent such discharges are associated with direct discharges of water from the site to receiving waters.

Additionally, ADEQ should remove the following language from Section 5.2.3.2(f) in order to clarify the scope of the Draft Permit: "BMPs to minimize the generation of on site dust." The Draft Permit is not intended to cover wind-blow [sic] dust, and this language serves only to confuse permittees as to the permit's scope.

RESPONSE NO 15: The dry weather discharge prohibition referenced is in the CGP, not this permit. ADEQ has already responded that provision does not encompass windblown dust. Section 5.2.3.2(f) has been removed from the final permit.